THE LAYMAN'S DEMAND FOR IMPROVED JUDICIAL MACHINERY[1]

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Some day before long, laymen will demand that lawyers and judges organize the courts and systems of legal procedure for the better administration of justice. Before that day comes, men in general will have learned a great deal more than they know now as to ways and means of making democratic instrumentalities yield results and as to brushing aside individuals or classes who seem to stand in the way of such a consummation. No matter how brief or how protracted is the participation of the United States in the war against Germany; no matter whether American energies and resources have been taxed to the uttermost before the dawn of peace sends the wonderfully organized military, industrial and civic forces of Europe back to take up again the threads of a transformed industrial life, the admonitions of the European experience and the reconstructive impulses of the present period of preparation in this country are certain to combine to bring marked changes in the integration, coördination, and general organization of public affairs and commercial management in the United States. The sort of thing which has been done in many departments of governmental activity, under the pressure of wartime necessity and as a measure of organization for national self-preservation, will be carried on and extended by men who believe that if such things can be done for public benefit in time of war, similar things can be done for public benefit in time of peace. No one can read English newspapers and periodicals during the past year without a realization that in the reorganization of industry, the "speeding up" and "tuning up" of public administration, and the development of an altered attitude on the part of the general public towards essentially public concerns, the last two years of the war, have been more eventful, more fruitful,

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and more far-reaching than any other two hundred years of Anglo-Saxon history. England and France will not soon return to slip-shod, unsuited methods of mismanaging public or private concerns, and all the world will feel the consequences of what has taken place, irrespective of whether a particular nation is or is not impelled to similar action by similar necessities.

THE DEMAND FOR IMPROVED JUDICIAL MACHINERY

The ending of the need for better organization for war is bound to bring, in the United States and elsewhere, emphasis on the need for better organization for the tasks of peace. Old formulas and methods will be squarely challenged and unhesitatingly discarded, if found at variance with the recent experience. The ten years following the close of the world war are almost certain to be years of iconoclasm, of smashing of idols and breaking down of long established institutions; of predisposition to change and restless searching for methods which minister more directly and unmistakably to newly manifest needs. Institutions which are to survive will have to be put in order to meet the challenge and endure the test; members of the bar will, in particular, as is traditionally true in all periods of flux and readjustment, be confronted with an especial responsibility, twofold in its aspect: a responsibility for an open-minded readiness to work out needed changes in a timely, sound, constructive way, and a responsibility for leadership in resisting mere denunciation and demand for mere change for its own sake, whether for better or for worse.

We have been talking and writing about judicial reform in the United States for a good many years, and have been making considerable headway, more than is readily recognized even by the bar, and far more than is ever recognized by the ready lay critic of courts and legal institutions. At the same time I have not the slightest doubt that the severest test of, and onslaught upon, the American system of administering justice according to law is still ahead; and changes are coming within the next twenty years far more drastic and thorough-going than have thus far taken place, from the time our Constitution was set up and the English common law appropriated from across the seas. I do not think the assault will be made upon the spirit or substance of our laws, or upon the ultimate responsiveness of the courts and legal doctrine to the changed social

standards of the people; I think our Constitution and our common law, supplemented by statute, will continue susceptible of constructive and progressive adaptation, as Mr. Justice Moody said, "to the infinite variety of the changing conditions of our national life." The difficulty is coming as to the *mechanics* of our judicial system, the suitability of present-day legal procedure as a modern device for the accomplishment of a basic end, the administration of prompt, impartial justice under law. The economic and social readjustments following in the wake of the war are bound to give new force to the demand for more suitable organization and more direct administrative expedients in the judicial branch of government. Already the iconoclastic voice of the lay critic is being heard along lines well-founded only in part. For example, an excellent article in a recent issue of the widely circulated *Saturday Evening Post*, dealing with the readjustments which war-time conditions are likely to bring, concluded as follows:

> The thing which refuses to change—the one bulwark of our civilization which declines to conform itself to modern needs and modern conditions and modern transformations—is the method of administering and interpreting the civil and the criminal laws. The surgeon who dared practice his profession by the ethics and the standards of a hundred years ago, or even of fifty years ago, would be prosecuted, most likely, for malpractice; the business man who endeavored to carry on his business as his grandfather before him had carried it on would go briskly into bankruptcy; the editor who ran his newspaper the way they ran newspapers when Horace Greeley and George D. Prentice were alive woudn't run it any longer than it took for the sheriff to catch up with him; but the lawyer hobbles along in his rusty shackles, clanking the leg-irons of ancient precedent, and violently opposing the introduction of labor-saving, time-conserving improvements into his trade, because such steps would distress Coke, and possibly give pain to Littleton, and mayhap cause Blackstone peevishly to toss about beneath his tombstone. Counsel for the other side still may browbeat the citizen on the witness stand as though the latter were a malefactor at the bar, doing it with the full approval of His Honor upon the bench, not because there is any fairness in it, but because such always has been the rule in courts of law. Because of a steadfast devotion, among the lawyers and the judges, to traditions and to texts and to precepts which in other callings would have been outgrown and cast aside years and years ago, litigation means vexation and justice stands blindfolded with procrastination on her one hand and delay on her other. A misplaced comma in the indictment invalidates the just conviction of the criminal and saves him from the punishment he merits. The mote is more important to be plucked away than the beam, and those august gentlemen in silken robes, sitting in the high places of the high temple, gag at the gnat and swallow the camel without visible strain. That bumpy, torpid appearance, so often observed, is the result of having swal-

lowed many camels. Verily, as has been said before, we live in times of change, and no man knows what the morrow may bring forth; but of this much we may be sure: That, disdaining all the filtration devices of progress, the law will continue to be true to the moss-covered precedent, the iron-bound precedent that hangs in the well.

THE LAYMAN'S CHALLENGE TO THE NEWER GENERATION OF LAWYERS

Much of this appears to the trained legal mind to be loose and undiscriminating lay comment, but therein lies most of the danger. The constructive tasks of the post-bellum period are not likely to be reposed in the hands of judges or lawyers; laymen commonly *think* something very closely approximating the statements above quoted; and unless jurists and lawyers deal with these procedural derelictions in *timely* and *adequate* fashion, laymen are likely to make short shrift of legal traditions and impatiently to brush away formulas which lawyers like to think are essential to the very life of the law.

This article is the product of an effort to outline certain impressions and certain queries which have come to me during a service of three years and a quarter in a very busy court. They all concern one central subject, the *mechanics* of administering justice according to law, the suitableness and efficacy of the *means* by which in the judicial sphere society seeks to secure the assumedly desired *result*. For the most part the paragraphs which follow are made up of impressions and queries, rather than conclusions or contentions. No merit of novelty, originality, or even finality of individual inference, is claimed for anything here written.

For years much of the ablest and most progressive and constructive thought in this country has been given to the perfecting of our executive and legislative machinery—municipal, county, state and national. The slogans of a dozen efforts along these lines are household words throughout this land. The "short ballot," "the commission form of government," the "city-manager" plan, civil service reform, the coupling of power with responsibility, the introduction of expert handling of matters requiring expert knowledge, "proportional representation," reduction in the size of local legislative bodies, enlarging the unit from which its members are elected —these are some of the phrases which summarize a quarter-century of constructive effort for the mechanical improvement of executive

and legislative departments. The significance of these suggestions is well taught in our colleges, but parenthetically may be interjected here the first query: *Have we given, are we giving, similar attention to the perfecting of the organization of our judicial establishment?*

Justice poorly administered may be justice wholly denied. If the organization and procedure of the judicial branch of government is not kept abreast of the needs and experience of the times, of little avail may be the good intentions or the ripe learning of individual judges or the sociological acceptability of the legal doctrine they expound. It may be added that the course of judicial decision in this country during the past five years confirms strongly an observation which I think may also be drawn from the whole history of Anglo-Saxon jurisprudence, *viz.*, that legal doctrine, as such, is far more flexible, adaptable, susceptible to wholesome influences which make for timely conformance to changed social standards, than is the machinery of jurisprudence, the organization and procedure of the courts. I have accordingly come to believe that a large part of the present-day dissatisfaction with justice as administered by the judicial branch of government is due to the consequences of poor organization and unsuitable procedure, rather than dissatisfaction with the law as such.

A RESTATEMENT OF PERTINENT FUNDAMENTALS

In order to get our bearings on the problem, it may be of value to re-survey certain fundamentals. The President of the United States, in his remarks before the American Bar Association in Washington in 1914, phrased a pointed summation of the criticism which, in one form or another, has oftentimes been directed against the administration of justice—the charge of great variance between the justice which is the product of a judicial proceeding and the justice which the sense of fair dealing innate in every human breast conceives by intuition to be applicable to the particular dispute. Thomas Hobbes in his great studies of the common law reached the conclusion that there could be no "justice" that was not identical with "law," and John Norton Pomeroy in his research into the origin of equity jurisprudence referred to the concept of "justice" known to the Roman jurists as the *arbitrium boni viri*, which he translated as "the decision upon the facts and circumstances of a case which

would be made by a man of intelligence and of high moral principle," and added that if this theory

> which now prevails to some extent should become universal, it would destroy all sense of certainty and security which the citizen has, and should have, in respect to the existence and maintenance of his juridical rights. . . . . Every decision would be a virtual arbitration, and all certainty in legal rules and security of legal rights would be lost.

LEGAL ADMINISTRATION AS A FACTOR IN GOVERNMENT

Mr. Frederic R. Coudert, esteemed on two continents as one of the most scholarly leaders of the American Bar, has recently said:

> There is in all modern states today a general conflict between certainty in the law and concrete justice in its application to particular cases: in other words, between the effort to have a general rule everywhere equally applicable to all cases at all times and the effort to reach what may be concrete right dealing between the parties at bar upon the particular facts in each case. On the one side is made an appeal to "Progress"; on the other to "Precedent". . . . . When rules (of law) become so fixed and rigid that they are difficult or impossible to change, the law is out of touch with prevailing notions of social expediency, which, like other opinions, are constantly changing; the law thus necessarily becomes a clog upon national development, an incentive to revolutionary reform. . . . . The conflict between the wisdom of past generations, as embodied in "Precedent" and the ideas of the present day concerning right and justice, usually denominated "Progress," has been for some time past more than usually acute.

What is the significance of the present-day acuteness of the "conflict" to which Mr. Coudert has referred? The history of civilization is the history of progress of the people in governing themselves according to law. It is the history of the decline of caprice and the substitution of self-restraint, individual and social; the history of the decline of favoritism, and the substitution of a rule of equality; the history of the decline of the authority of individual and impromptu standards, and the substitution of the authority of a fundamental social conscience and common standard. The end and object of government is, as Alexander Hamilton pointed out in the Federalist papers, the attainment and enforcement of justice; that is to say, the object of government is to bring it about that, in the determination of the rights and liabilities of individuals in their relations to each other and to the community as a whole, there shall be enforced a practical conformity, not to individual standards solely, but rather to the principles of fair dealing which have come

to be commonly held and generally accepted. Justice being the thing sought by the organization of government, men came readily to see that this conformance to the community standards of fair dealing could better be secured through the establishment and enforcement of definite rules of action prescribed by constituted authority—in other words through law—than through leaving the applicable ethical principles to be ascertained in each individual case as it arose, without reference to what had gone before. Thus it came about that law came to be regarded as the essence of justice, and the history of progress in government came to be virtually the history of progress in the administration of justice according to law.

The administration of justice is, as we have seen, not necessarily justice according to law; unrivalled and perfect justice may conceivably be administered by a ruler governed only by his own discretion or by a tribunal which enforces only its own standards and views. But the enlightened experience of human-kind has preferred an administration of justice according to defined standards and ascertainable rules, expressive of a generally accepted community-standard of what is right and fair—in other words, according to law. The administration of justice according to law is not necessarily an administration of justice by courts; executive and legislative officers of government often perform a large part of the administration of justice, and especially in times of popular dissatisfaction with the work of courts there is a strong tendency to entrust to administrative commissions the determination and enforcement of the community standards applicable to special classes of property or individual rights. Yet the enlightened experience of human-kind has advised that the judicial function be entrusted generally to separate tribunals, which construe and apply the rules, limitations and standards prescribed by the people as the sovereign authority, and also develop that series and system of broadening precedents which come to constitute the body of the law and provide a continuity of consistent determination of analogous cases.

PROMPTNESS AND CERTAINTY AS FACTORS IN "JUSTICE"

The reason why this legal conception of justice has gone hand in hand with human progress and has been indispensable to it is that, as economic and social conditions became more complex, certainty and uniformity in the arbitrament of individual rights became more and

more essential. Men had to know what they could depend on; they felt the need that commonly accepted standards should prevail in the determination of rights of property and personal obligation. The administration of justice according to a common and ascertainable standard became of greater social importance than the perhaps larger individual justice which might be secured from the determination of each case without reference to what had hitherto been done in any similar case. Social needs and social justice became paramount to individualized justice. It was found that rule and order in the administration of justice alone can enable men to act with reasonable assurance for the future; alone can insure an equal and impersonal adjudication of individual rights; alone furnish security from errors of individual judgment and impropriety of personal motives; alone guard against the sacrifice of ultimate interests, social and individual, to the transient but more clamorous demands of the particular exigency. This is why the administration of justice according to law became the essence of the modern state; this is why the court of justice according to law continues the distinctive institution of popular governments. "Respect for, and obedience to, the law," is, as Theodore Roosevelt has said, "the cornerstone of this republic and of all free governments," because the respect which the people have and manifest for the law and the courts is but an expression of what respect they have for themselves and for the fundamental standards and orderly conceptions of procedure which they have themselves set up for the fulfillment of their underlying social purposes. The people established the organic law as embodied in their constitutions; from time to time they amend or revise these constitutions; directly or through their representatives they enact the statute law, substantive and procedural; and they choose the judges who interpret the written law and develop the great body of judicial precedents which come to have the force of law. Dissatisfaction with, and criticism of, the courts and the administration of justice, therefore, become social phenomena of startling significance; when generally prevalent they indicate that in some manner the courts themselves, the body of the law which they administer, or the machinery of its administration, have become no longer fairly expressive of the fundamental social standards which they were created to apply. When a widespread popular demand arises for the breaking down of the established restraints and the accumulated precedents, and for

the restoration of a larger legislative and executive discretion pending the establishment of new judicial standards, there is need for a thoughtful reëxamination of the fundamentals of our institutions and a constructive survey of the present-day relationship between law and conscience; need likewise for a reëxamination of the elements of our judicial organization and legal procedure in the light of the progress which mankind has been making in methods of ascertaining the truth and expediting the conduct of business.

SHALL PROCEDURE KEEP PACE WITH DOCTRINE?

Today we are face to face with a period of frank, vigorous, thorough-going criticism of our judicial system. We are called to answer a square and reasoned challenge of the efficacy of our system of administering justice according to law. A great deal of current criticism, it is true, takes the form of violent appeals to prejudice and cupidity, and is phrased in terms of anger and unreason, and emanates from sources entitling it to neither respect nor consideration, except as recurring phenomena of unrest. I do not refer to or propose to discuss that kind of criticism; I do not in this article refer to or propose to discuss the criticisms voiced by sociologists and humanitarians who complain that their projects of human betterment are often thwarted by judicial decisions adhering to discredited theories of economics and government. I here refer only to that increasing volume of what may be regarded as conservative and constructive criticism, emanating from sources not usually given to adverse comment on our judicial system and based upon a real sympathy with the spirit of our laws and a sincere desire to make them effective instruments of justice. We are squarely asked whether juridical *mechanics* shall keep pace with legal *doctrines*; whether our machinery for administering the law shall be permitted to lag far behind the law it administers; whether justice as commonly conceived in the community shall be always delayed and oftentimes defeated by the community's own failure to provide suitable instrumentalities for its administration; whether we shall not soon begin to do for and with our judicial system and legal procedure that which we have been putting into effect as to our legislative and executive departments, in city, state and nation.

On the substantive side of the law we are today in the midst of a period of transition, readjustment and adaptation. The paragraph

which I have quoted from Mr. Coudert admirably epitomizes present day developments in that regard. This is a decade of humanitarian awakening on one hand and open-minded utilitarianism on the other. There is an effort to take into account new conditions, and an effort to make instrumentalities yield more efficient results. Old formulas are being found inadequate, under rapidly changing conditions. Problems take on new complexity; new conditions bring a new point of view, a new sense of public and private duty, and the suggestion of new remedies. Employers have a new sense of obligation towards their employes. Owners of great accumulations of capital have a quickened sense of trusteeship, the managers of large private enterprises have a changed view as to the permissible limits of commercial competition. This humanitarian spirit seeks to find expression in laws and in constitutional provisions. Yesterday's standards of what constitutes the measure of the employer's duty to the employe, for example, are definitely and almost universally discarded today. The community has moved on; the public conscience has broadened and quickened; adherence to yesterday's standards arouses only resentment and rebuke. The changed view comes, and then the people expect every instrumentality of government to accept and reflect that change. When the courts fail to do so, criticism results. The more emphatic the awakening of the people in any particular period, the more emphatic the popular resentment against legal precedents or legal machinery which lag behind.

ANALOGIES FROM LEGAL HISTORY

That is the history of progress in Anglo-Saxon law. What is taking place around us today is not new. The Romans, sagacious in avoiding difficulties, had a most convenient system for keeping their law abreast of the times. When judicial precedents made in private suits became greatly embarrassing in their limitations upon public policies, the praetor was empowered simply to abolish them. Thus the Roman law was kept flexible. But English law has, doubtless fortunately, known no such method. With us only an uprising of public sentiment accomplishes this emancipation of justice from the thralldom of ancient precedents, and infuses into the law the vigor of new ideals and concepts. In England in the sixteenth century, justice was tied hand and foot with rigid and cumbersome rules. Precedent was everything; technicality and

form were decisive; equity was unknown. A great sixteenth century judge held that, even after a bond had been paid in full, the holder thereof could sue upon it and recover the full amount, unless a formal receipt and release under seal had been executed and could be produced. When his attention was called to the unfairness and inequity of such a rule of law, such considerations meant nothing to him. He felt bound to follow only the precedents and to regard only the dry forms of the law. Rulings such as these produced an uprising of public opinion, led to the creation of Courts of Equity presided over by chancellors who were not lawyers but clergymen, and thus brought permanently into the law a great body of ethical conceptions which had their origin wholly outside the law. And so in the eighteenth century Lord Holt, one of the great English judges, held that a person to whom a promissory note had been endorsed and transferred could not sue upon it. The customs, needs and common practice of the business men of the United Kingdom meant nothing to him. It was enough for him that the strict precedents of the common law did not recognize commercial paper as negotiable. He said that tradesmen should conform their business to the way which was legal, rather than that the law should be conformed to the custom and conscience of the country. Of course, Lord Holt had "guessed wrong" and Lord Mansfield was right, and the law merchant became one of the most universally approved parts of our law. The judgment and needs of the people had triumphed over the strict rules and precedents of the law. The essential justice and fairness of the law merchant was infused *en masse* into the English law and was followed in this country, although even Thomas Jefferson, supposed high priest of progress, argued vigorously for a rule of legal construction which would "rid us of Mansfield's innovations."

A PERIOD OF TRANSITION IN THE LAW

Today we are in the midst of a similar period of transition in the law. Just as surely as in the sixteenth and the eighteenth centuries, our law is today being infused with a new body of social and humanitarian conceptions which reflect and express what is taking place in the world at large. A radical change in fundamentals of legal viewpoint is upon us and is taking place before our eyes. The sixteenth century judge who barred the doors to the doctrines of equity, and

the eighteenth century judge who barred the doors to the law merchant, have had their present-day parallel in the twentieth century judges who insisted upon enforcing their own economic and political concepts, rejected by the legislature and the people, and stubbornly refused to admit into our law the humanizing influence of twentieth century concepts of social justice; likewise in those who have failed to do their part in bringing legal procedure abreast of present-day standards for ascertaining facts and weighing their import. Yet the infusion of this new doctrine has been taking place, none the less, in this and every other state; we return only to the query whether similar advance is being made on the procedural side.

Take a single aspect of the change which has come in the application of legal rules to social conditions, that which deals with the liability of the employer for injuries to his employe in the course of employment. Originally, the employer had no liability and the employe no recovery. Then came the doctrine of negligence, that the employer was liable if the injury was occasioned by his failure to use proper care for the protection of his employe from injury. Even this doctrine marked a great advance over the remediless plight of the injured employe before; yet more recently the negligence doctrine came to be regarded as an inadequate expression of the humanitarian spirit of the age. The courts had introduced various refinements into the doctrine, to reduce the liability of the employer. He was held not liable if the injuries were occasioned by the negligent act of a fellow-servant or fellow-employe. Public conscience compelled the changing of this rule so as to hold the employer liable if the negligent fellow-employe of the injured worker had been entrusted with any duties of superintendence. Courts had held that the employer was not liable if the injury was occasioned by any conditions or dangers as to which the worker assumed the risk by entering the employment. This doctrine of "assumption of risk" was, by pressure of public conscience, either abolished altogether, as to some employments, or modified so as to make the risks assumed only those which necessarily remained after the employer had carried out his full duty of protecting the worker. The courts had held that the worker could recover for the employer's negligence only if he could first affirmatively prove that he (the worker) was free from contributory negligence, in other words, that no fault on his part contributed in the slightest degree to

the accident. Public conscience changed this rule, either by shifting the burden of proof of the employe's negligence to the employer, or by practically abolishing the rule altogether. From time immemorial it was the steadfast doctrine of the law that no liability could be imposed on an employer for an injury not the employer's fault. When an "experimental" statute was passed in New York, imposing liability without fault on the part of the employer, the Court of Appeals unanimously followed established precedents and held the statute unconstitutional, under both the state and the federal Constitutions. But the militant public sentiment of the state rose up and, in November, 1913, reversed and abrogated this ancient rule by a popular vote of about three to one, and substituted the rule that the employer might be held liable for all injuries sustained by employes in the course of their employment, even though the employers were not definitely at fault, and that the cost of compensating injured employes might be passed on to consumers of the product in whose manufacture the employes were injured. The popular adoption of this constitutional amendment was promptly followed by the legislative passage and executive approval of a workmen's compensation law far more sweeping, drastic, and "compulsory," than the tentative and "experimental" statute which had hitherto received the condemnation of the Court of Appeals. That court, when called upon to decide whether the later statute, now expressly sanctioned by the state Constitution, was to be deemed to violate the federal Constitution, squarely and admirably bowed to the course of events in state and nation, and sustained the validity of the new plan of compensation for industrial accidents.

ADMINISTRATION OF THE LAW TAKEN AWAY FROM COURTS

The foregoing are but some of the legal details, the legal battle-plan, of the contest which has been waged in this field between "Precedent" and "Progress," between fixed rules of law and the forward-looking spirit of the age. The incidents which I have cited as to the infusion of new and radically different social conceptions into our law governing the compensation of injured employes only illustrate the broader struggle and typify the essential principle which is slowly but surely being injected into our American jurisprudence, *viz.*, that a first charge upon the wealth produced in this country shall be the maintenance, in reasonable comfort and accord-

ing to reasonable living standards, of those who, by hand or brain, produce that wealth. The more interesting fact, from the point of view of the purpose of this article, is the effect which this agitation has had upon the procedure and mechanism of administering justice in this domain of legal right. The courts and their rules of evidence, procedure and the like, seemed to have flung themselves in the pathway of the results a changing public opinion was trying to bring about. For a heated year or two there was in consequence a period of sharp criticism of the courts, of discussion of "judicial obstruction of the will of the people," of ways and means of "overcoming the judicial obstacle to welfare legislation," and so on. Legal *doctrine* then gave way and the courts came fairly abreast of public opinion, but the brief period of "judicial obstruction" operated to remove the administration of the new legal concepts from the courts altogether. The administration of the workmen's compensation laws was taken from the courts and placed in the hands of newly created commissions, made up preponderantly of non-lawyers and specifically freed from the "technical rules of evidence" and other court-made rules which hitherto had been judicially invoked in bar of the humanitarian plan. Instead of bringing judicial procedure abreast of present-day business methods for ascertaining facts and determining controversies, public opinion took the performance of essentially judicial functions away from the courts altogether and attached their performance at least nominally to the executive branch of government. Instead of leaving the application of this branch of the law entrusted to the trained and impartial minds of members of a court emancipated from the cumbersome procedure and evidentiary rules it was desired to avoid, public opinion eschewed the court and the judicial atmosphere altogether, and turned this branch of the law over to men who were not lawyers and who, it was felt, would not be likely to clog and fetter the law again with outgrown rules and the trappings of a past age.

In 1913 the accident of a judicial nomination I had not sought and did not think I desired was followed by an election which transferred me from an administrative to a judicial office. In the administrative connection I had been performing functions quasi-judicial in their nature and operations—the ascertainment of facts, the weighing of the import of conflicting statements, the application of legal rules, the summoning of expert opinion to aid on technical aspects of

mooted problems, the sifting of truth from falsehood, the meritorious from the unfounded, the material from the inconsequential. In the performance of these duties I was a part of an admirably organized public department; few that I have seen in private business, and none in public affairs, surpassed it in the directness, efficiency, promptness and accuracy of its administrative processes. Although my duties entailed impartiality and open-mindedness, neither quality was deemed negatived by a prompt, direct, thorough ascertainment of the full facts, in the best way available. Although I constantly required technical aid, "opinion evidence" on expert matters, I was not called upon to listen to "hired experts" for any particular point of view or contention; the "experts" called into counsel were as disinterested and open-minded as I was. Simplicity and responsibility in administrative mechanism were constant objectives. It was seen that one responsible officer should be placed in position to deal adequately and continuously with all phases of a given matter from start to finish, and that to create "too many cogs" in the machine or to divide and subdivide the responsibility for decision, was to fly in the face of sound principles of staff organization to accomplish results. From the application of legal principles to concrete facts in such an atmosphere and under such an organization, I was suddenly switched to a bench and a gown, a stenographer and a corps of attendants; counsel and witnesses were placed at a distance; the atmosphere became one of a "game," a contest of wits, over which I was "umpire" but in which I was no longer regarded as an instrumentality with affirmative responsibility for seeing to it that the trial was simply, quickly and accurately elicited and justice done according to law. Experts, I found, had been transformed into hired advocates; oratory and pettifogging were substituted for quiet, direct discussion; controversies were postponed until they were a year or two old, instead of a day of two old; perjury seemed to creep in with the administration of the oath; every one was assumed and desired to be densely ignorant until enlightened by the developments of the particular case; and the crime of crimes became the assumption or assertion of a particle of information or intelligence not potentially inculcated by the testimony droned into the ears of the stenographer.

COURTS HAVE NOT KEPT PACE WITH MODERN METHODS

This abrupt transition suggested to me from day to day certain queries, some of which I shall endeavor to indicate. I soon found, too, that something had happened to the business man's desire to have his controversies determined according to the certain standards of legal rules, if that meant coming to court. Business men of the very type who readily and habitually submit their transactions to the scrutiny and guidance of a legal mind, out of court, were willing to do almost anything, in the way of abdication of all or part of their rights, rather than submit to a determination of a controversy by a court. Men of a conservative, law-respecting type, who never had given me the slightest impression of disrespect for or dissatisfaction with *law*, in general or as chart and compass for business transactions, were, I soon found, ready to "settle for fifty per cent" of the amount in dispute, rather than be subjected to "a lawsuit," even in a court which has been considered peculiarly the "business man's court" in the metropolis.

This led likewise to analysis and observation as to the precise grounds of the business man's dislike for the judicial tribunal. In the past fifty years we have revolutionized our methods of the conduct of private business, and largely also the conduct of public business; our methods are more direct, exact, and to the point; they minimize the possibility of error, eliminate "lost motion" and cut "red tape." Yet to all this improvement in methods our judicial procedure has paid substantially no heed. The mechanics of a court room trial are still substantially the same as they were in the days when our ancestors rode in stage coaches, used tallow dips or pine knots for lighting, and had never dreamed of "efficiency engineers" and the marvelous business development of today. I do not suppose that an alert business man or "business lawyer" ever comes from his well-organized, perfectly coördinated office into a present-day court without feeling, consciously or unconsciously, that somehow the court has failed to keep pace with the life of the community which surges outside its walls, and that somehow the organization, procedure and administrative routine of that court hark back to an era which the business community outside has necessarily superseded, in order to hold its own in the commercial competition of today. Judging the court by present-day efficiency standards and

looking upon it as a mechanism for bringing about a result, the average court is the most indirect, inexact, inefficient, uneconomical and unintegrated instrumentality in the modern state, and the wonder is, not that justice is at times so inexactly and tardily administered, but that substantial justice between man and man is so often the outcome of proceedings in such a tribunal. The improvement of the administration of justice, the reform of our legal procedure, the adaptation of twentieth century methods to the administrative organization of the courts, are tasks of the first importance, to which should be devoted the finest constructive ability that is sent forth from our colleges of law.

Is it surprising that a business man who has no quarrel with "law" nevertheless seeks to avoid the courts? The tribunal to which, as a last resort, the business man submits his controversies with his fellows is practically the only institution of private or public activity which, in its administrative and procedural methods, still lumbers on in the same old way of fifty or one hundred years ago. Right here, also, I am inclined to believe, will be found the responsibility for much of the acuteness and unacceptability of the variance between justice as administered in a court and justice as innately conceived by the average man of intelligence and good conscience. I do not find men unwilling to have their disputes and controversies determined according to the principles of our substantive law. It is not a desire to avoid the application of rules of law which drives business men out of the courts, into reluctant settlement of controversies which should be litigated on their merits or into the submission of them to arbitration tribunals established by private agencies. Litigants do not submit themselves before the arbitration committees of commercial organizations in order to secure the *arbitrium boni viri* or to subject their property and rights to individual judgment as substituted for long-established rules of the substantive law.

POPULAR AVERSION FOR LEGAL MACHINERY

The aversion of the average man is rather to the procedural and administrative side of our legal machinery. He believes in and needs the administration of justice according to law; the safety of his transactions requires certainty and rule as the basis of individual and property rights. Uncertainty and inequality were long ago called

"the twin bugaboos of Anglo-Saxon jurisprudence." Popular dissatisfaction with the law, as I have come to believe, is based not so much upon any variance between justice according to the substantive law and justice according to the *arbitrium boni viri*, as upon the great variance between the justice which would result from a fair, prompt determination of controversies according to substantive legal principles and the "justice" which does result from the existing procedural mechanism of our courts. Business men go to arbitration to avoid legal *procedure* and not legal *principles*. To "tune up" and "speed up" our judicial mechanism, to "cut out" the delay and "lost motion," to organize our courts and their workings along lines which take cognizance of twentieth century experience and expedients, and to bring to the aid of the courts those direct and simple administrative aids which modern progress has made available in every field of activity, are some of the paramount tasks of the present day, in which every young man coming to the bar should plan to do his part.

HAPHAZARD TECHNICALITIES WHICH MAKE JUDICIAL ADMINISTRATION ABSURD

Instances of haphazard and uncoördinated provisions, of the kind which have the effect just indicated, may be cited from the code sections governing almost any court. They naturally arouse the contempt of a business man when he finds himself trying to steer a course through and by them; they drive him from the court house with the impression that he and other business men are sure to lose, no matter who wins the juridical verdict, if they have anything to do with "a game played under such rules"; they represent a kind of "trappings" and "red tape" which business men have long since rejected, in the conduct of other aspects of human relationship. A single instance may suffice at this point. For reasons which are indicated in some detail elsewhere in this article, the City Court of New York, of which I was a member until my recent resignation, is the natural forum for the business men of the metropolis. It is, in many respects, as it has been called, "the great commercial court of the metropolis," because its jurisdiction embraces a large part of the controversies which arise between the great rank and file of small business men, and its calendar practice has been adjusted in certain respects to develop the court as an acceptable commercial

forum. Because it is no worse off than alternative forums, even in the respect I am about to indicate, the City Court continues to be the tribunal for the trial of a large part of these controversies, yet what of the procedural maze which envelops the unhappy litigant as he contemplates this "business man's court?"

A plaintiff may *sue* in the City Court for any amount of recovery in any action—for example, for thirty thousand dollars, instead of two thousand; the jury may *render* in his favor a verdict in any sum in any action; but in certain kinds of actions—in fact, in most actions, the clerk may not *enter* the verdict in a sum exceeding $2,000. If the jury finds for more than $2,000, there are certain kinds of actions in which he may enter a verdict for the full amount as rendered; for example, there have been judgments for $20,000 or $30,000. But in other kinds of actions, he may not enter the verdict in a sum exceeding $2,000, no matter what the verdict in fact was. At the same time he may enter the verdict for $2,000 plus interest, in certain instances where interest is an allowable factor, even though the addition of interest brings the verdict's total to a sum greatly exceeding $2,000, as is often the case.

On the other hand, if a plaintiff sues in the City Court for any amount, say $500, the defendant may interpose a counterclaim without limit, and, although a counterclaim is merely the cross-assertion of a separate right of action which he might have asserted in a separate action, he may recover, and the clerk may enter, a verdict in any sum on the counterclaim. If the plaintiff is entitled to sue for more than $2,000, the City Court cannot award him more than that sum; the defendant's counterclaim is bound by no such limitation. If the jury's verdict in the action in favor of the defendant on the counterclaim proves to be for $50,000, or any greater or lesser sum, the clerk is authorized to enter the verdict in the sum fixed by the jury, even though the plaintiff only sued for $500, or even though the plaintiff would have been fairly entitled to receive more than $2,000, but could not, had the disputed questions of fact been determined by the jury the other way.

If a bond is given in one of the classes of actions in which a plaintiff's verdict may not be entered in a sum exceeding $2,000 and interest, and an action is brought in the City Court upon that bond, there is no jurisdictional limit on the amount for which judgment

may be entered in the action on the bond, even though there was in the action in which the bond was given.

If a business man as plaintiff sues in the City Court to recover a chattel, more than $2,000 may not be fixed as the value of the chattel, but if the same man sues for damages for the detention of the same chattel, he may recover $20,000 or $2,000,000. There is no limit on his recovery.

WHY BUSINESS MEN ESCHEW LITIGATION

Instances like these rouse and rally the enthusiasm of the business man for resort to "the business man's court!" If the master of a ship assaults one of its seamen while the ship is tied at the wharf in the port of New York, the City Court of New York may not award the injured mariner more than $2,000. If the assault and battery took place while the ship was three miles out at sea, the same court may award the same plaintiff any sum warranted by the evidence, without limit.

If a young woman quarrels with her sweetheart and wants to recover back the money she had lent him while she thought they were to be "partners" for life, the City Court can give her only $2,000 of whatever may have been the actual amount loaned, yet if the same girl sues the same man in the same court for his breach of his promise to marry her, she may receive a verdict in any amount, without limit, and verdicts greatly in excess of $2,000 are by no means uncommon.

If a business man wishes to sue the City of New York, he will be surprised and puzzled to find that he cannot sue the City in the City Court! He must sue the City in the Supreme or Municipal Court.

If he wishes to sue a defendant in the City Court, he may not serve the defendant with the summons anywhere in the city, but only in certain parts of the city. If he wishes to be able to serve his adversary anywhere in the city, he must forego suing him in the City Court and sue instead in the Supreme or Municipal Court.

The City Court has no jurisdiction to hear and determine a cause of action in equity, but it may hear and determine equitable defenses in order to defeat a cause of action of which it has jurisdiction at law.

If the business man sues in the Supreme Court and his case is on the calendar eight terms of court, he may, when he prevails in the action, tax as costs an allowance for five terms; if he sues in the City

Court, he may tax but one term, even though the case was on the calendar eight or ten terms.

CONFUSING CHOICE OF FORMS AND FORUMS

Imagine the impressions which an average business man forms of legal procedure and technicalities as he comes in contact with some of these hit-and-miss distinctions. Try to conjure up the impressions which he carries away with him after a period of jury service. Picture the difficulties of a lawyer endeavoring to explain the "whys and wherefores" of such artificialities to a busy client unlearned in the law. The City Court may grant the business man as litigant a warrant of attachment against the property of a foreign corporation, but not a domestic corporation; it may upon his application aid him to collect an adjudicated debt from a foreign corporation by appointing a receiver of its property and assets, but if the "deadbeat" debtor be one of New York state's own creations, incorporated under the laws of the state which create the court, the latter can aid him in no such way.

If the business man wants his attorney to obtain an attachment in New York county, he finds a confusing choice of forms and forums. Four different and separate modes and details of application are prescribed in separated sections of the code—one each for the Supreme Court, the City Court, the County Courts and the Municipal Courts. A form of application sufficient in one court is fatally defective in another, although each application seeks exactly the same remedy. If the business man's lawyer makes the right form of application to the wrong court, his bewildered client is at least delayed, and is often defeated, in his interlocutory right, on which jurisdiction or the collectibility of his judgment may wholly depend.

IN THE NAME OF "REFORM" AND "SIMPLIFICATION"

And so it goes. Instances might be extended and multiplied. Many of these anomalies were graphically summarized by my former colleague, now Supreme Court Justice Donnelly, in an address before the New York County Lawyers' Association in January, 1912. These instances do not concern some slow-going court in a backwoods community, but "the business man's court" in the greatest city in the world. Similar things exist and persist in practically

every court I know; I have cited these because they have come nearest my heart and daily work for three and a quarter years last past. Only the legislature has power to change them; only constitutional amendment could take away from the legislature the power to change them, or to restore them, were they changed. They exist and persist; business men are bewildered and driven to distrust courts and avoid litigation; newcomers to our shores are given the impression that courts and laws, the very cornerstone of our American concept of equal rights under uniform and salutary rules, cannot be made to operate for their protection, but are something to be avoided at all hazards. And within the past few months a thoughtful and representative committee of the New York legislature, headed by an able lawyer, very solemnly proposed to "revise and simplify" procedure in the City Court by bringing all these anomalies and anachronisms together into one "City Court Act," carefully preserving each and every one that I have cited and multitudes more! This drastic and thorough-going reform has happily been postponed for the time, and the lawyer who wishes to find the code authority for these absurdities will have to go on searching through many pages and countless sections; but, unless revelation be deemed the beginning of betterment, the careful collection, codification, preservation and perpetuation of such "trappings" and handicaps on a "business man's court" can hardly be deemed even a start in the direction of law reform.

A CONCRETE INSTANCE OF RELIEF FROM DELAY AND CONGESTION

What I have been saying on the subject of the betterments which might, in many instances, be worked out by and through the judges themselves, without change in the constitution or code, has not been from a viewpoint wholly academic and theoretical. I have had a part in working out some instances of this sort of thing, in an atmosphere which will not be recognized as traditionally favorable, and have had an opportunity to see, concretely and from day to day, some of the actual workings of innovations which were inaugurated with some judicial misgivings. For example, as I have indicated, the City Court is in many respects the natural forum for the great volume of litigation which arises in the course of the metropolitan business transactions of the smaller dealers, merchants and jobbers, with their wholesalers on the one hand and their customers on the

other. The City Court is naturally a great commercial court, to which are conveniently brought the minor business controversies of business men in this great metropolitan center. Mixed in with this grist of commercial actions has been a great volume of tort actions of various kinds. For many years, it has been the custom to place all cases, whether contract or tort, commercial or otherwise, on the same calendar, and to afford them opportunity for trial when reached in the regular course, subject only to an anomalous and utterly unsound theory of preference, *viz.*, that if it appeared probable that a non-tort case could be tried within two hours, such a case could, on motion addressed largely to the discretion of the justices sitting in special term, be placed on a special calendar, known as the "short-cause" calendar and afforded a trial thereon within a few weeks or months.' The natural result of this miscellaneous grouping was congestion. Defenses of the most labored and plainly perjured character were interposed, in the form of verified pleadings, on the most flimsy pretexts; just enough was denied to create an issue avoiding the possibility of judgment on the pleadings. Thus a default was avoided and the case was placed on the calendar, which meant a protracted period of delay. By the time the case was actually reached for trial, the elasticity of the memories of witnesses had often been refreshed most liberally from the necessities imposed by the applicable rules of law, and a defense, originally interposed only for the purpose of creating an issue which would enable the long delay of trial, became a defense supported by more or less plausible testimony sufficient to carry the case to the jury. The result of the calendar system was thus long delay, and the result of long delay was to put a premium on perjury and make the way easier to a perversion of the facts by the testimony as ultimately given. The calendar of the City Court had in consequence gained a tradition of being a long time in arrears, and at the close of the administration of Governor Hughes, we find a trenchant paragraph of complaint in his annual message, based on the fact that the City Court calendar was then upwards of three years behind.

The situation in 1913 and 1914 was not as bad as it had been, but the tort-contract general calendar was still more than a year behind, and the possibility of delay in the trial and disposition of commercial cases was still so great as virtually to compel small business men to settle rather than litigate. In this way there was

substantially a denial to them of that justice under law which should be the portion of all men in a democracy. I accordingly urged upon my associates the advisability of creating a separate "commercial calendar," on which might be separately and speedily tried all commercial cases, that is to say, the business men's controversies, in which money has been definitely laid out or goods delivered, as to which the party suing cannot afford to remain long unrecompensed, if entitled to recover at all; for example, actions for money loaned, actions on bonds and instruments of guaranty, actions on written contracts for the payment of sums of money only, actions for work, labor and services, actions arising under the provisions of the Personal Property Law (Uniform Sales Act) in relation to the sale and delivery of goods, and the like. It was pointed out that, not only would justice be more substantially accomplished by a speedy trial of this class of cases, but that prompt trial would almost certainly enable all litigation of this kind to be disposed of in less time than required for its disposition under the system which mixed these cases on a congested calendar greatly in arrears. It was urged that in this way all commercial actions of the sort indicated could be "preferred" and given practically immediate trial on a special "commercial calendar," to which two trial parts of the court could be assigned, and that before very long it would be found that this preferment of the commercial causes would operate to reduce the arrearage of the general calendar as well, through reducing the quantity of time required for the trial or other disposition of the commercial causes so preferred.

THE WORKING OF THE "COMMERCIAL CALENDAR"

The justices of the City Court accordingly created, by their own rule, the now well-known "commercial calendar" of that court, and provided that upon the application of either side, a cause coming within one of the indicated categories could be transferred from the general calendar to that calendar for trial. The plan has worked well for more than two years, has overcome all misgivings and exceeded all expectations in its practical workings. It has brought into the court new and desirable litigation, and with it also lawyers of a grade who had generally shunned the long delays of the general hodge-podge calendar. Notwithstanding the influx of additional commercial business, the proportion of the total trial-term time of

sittings required for the disposition of the commercial business has been reduced, so that more time has apparently been available for the dispatch of the tort cases and other litigation. Instead of thrusting the tort calendar into further arrearage, the plan seems to have had an influence in accelerating the dispatch of business throughout the court, and during two years and a half of practically immediate trial of commercial cases, the arrearage on the general calendar has been steadily reduced. At the time of the writing of this article, the general calendar was only a few months behind, with a prospect that the month of June, or next October or November at the latest, will find the general calendar within a month of being up to date, which is about as complete an approximation of "speedy justice" as is practicable or desirable in the case of a tort calendar, made up of cases in which the plaintiff should at least be given time to get out of the hospital before the case comes on for trial.

During these two years and a half, therefore, it has been possible for a business man, if he had a cause of action within the limits of the jurisdiction of the City Court, to start his action and have a trial, if he so desires and so directs his counsel, well within the month from the time his cause of complaint arises. I have tried cases on this commercial calendar in which suit was started, tried, judgment obtained, execution issued, and the judgment paid and satisfied, within a month from the day on which the cause of action arose. Twice during my last month on the bench I found myself trying cases which had been ten days at issue. The result has been that lawyers and litigants have realized that through the agency of this special calendar a practically immediate trial could be had of a commercial controversy. Some of the consequences of this have been most interesting to watch; they afford an explanation why it has been true that an increased volume of commercial business could be disposed of—note I have not said "tried"—in less time than was required for the dispatch of this business when reached on a congested and long-delayed general calendar. In the first place, fewer fictitious, sham and perjured defenses are interposed; defendants will perjure themselves to create an issue which would gain a delay of a year or two, but will not take the risk to gain a delay of a few days. Thus a smaller portion of the actions started are ever actually tried. It may be said also that many actions are not started at all now which found a place on the general calendar heretofore, because there is less

incentive for a "strike" suit, if it is likely to be disposed of within a few days, when all the facts and documents are at hand and within the recollection of everybody.

PROMPT TRIAL DECREASES PERJURY

Furthermore, the prompt trial of these cases has had a most interesting effect upon the psychology and atmosphere of the trials themselves. After a year's delay, or two years', the parties and witnesses seem far more likely to give versions of the events which may euphemistically be said to "fit the law" and so to present questions of fact on which the determination of a jury is required. Beyond a doubt, in many instances, what takes place is that the witness forgets in the long interval the precise details as to which he had a measure of knowledge at the time the controversy arose. By the time the case comes on for trial the details have for the most part passed from memory and his recollection is refreshed from the lawyer's notes or oral restatements to him of the line of testimony which is expected from him. A great deal of unwitting perjury, of radical shading and reinterpretation of details, is thus accomplished, where there is long delay in trial. But given a trial within a month or two after the trouble arose, and the atmosphere of the trial is far different. The witnesses give a much more straightforward, credible, dependable version of what took place; they are testifying from their own fair recollection; there is less disposition, less incentive and less favorable setting, for conscious or unconscious reshaping of details of the testimony. In consequence, the cases much less frequently become questions of fact for the jury; far more often they present only questions of law for the court, and their prompt disposition is facilitated. One who has not watched the thing from day to day from the "inside," can have no accurate conception of the difference in the atmosphere of a trial, conducted on a calendar which is continuously up-to-date, as compared with that of a trial on a general calendar which ever lags a year or two behind. Prompt trial is the greatest preventive of perjury which the mind of man has ever devised.

I promised the chairman of the Committee of Nine, whose report is the keynote of this issue of *The Annals*, that in this article I would indicate concretely some of the impressions, queries and suggestions which have come to me during my brief period of

service in a busy court, as well as during rather strenuous professional activity prior to election to the bench. Elimination of the law's delay is of course only one phase of the problem, one segment of the circle. Justice poorly and inefficiently administered is but little more acceptable because of promptness in the rendition of its results. The whole problem will have to be dealt with sooner or later, probably gradually, in a much more thorough-going and constructive way; I cannot undertake to outline, in a single article, hurriedly prepared, anything approximating a comprehensive statement of desirable details of change; I undertake only to present for consideration certain impressions which have come to me and are put on paper for what they may be worth, in the stimulation of thought or otherwise.

Contrast legal procedure and judicial organization as it is with what it might become, through taking into account the administrative expedients and practices which have become familiar in business and commercial life. A business man has a cause of action against another business man. Neither he nor the other man had any quarrel with the legal rules which give rise to the action; they had their business dealings on the basis of familiar and settled rules of law; they disagree somewhat as to the facts of the case; what they want is a speedy determination of the *facts*, and then a prompt determination of their rights under the facts as found and the applicable rules of law, as commonly observed in the community for the conduct of similar business dealings. So the man with the cause of action consults his lawyer, and from that point difficulty begins and the business man's instincts for common sense, direct action tending to reach the merits of the case run afoul of legal procedure.

THE FORUM, THE PLEADINGS AND THEIR SERVICE

First come the *pleadings*. Around the legal concept of a "complaint" and "answer" has been created a great, swaddling mass of technicalities. Instead of simply, concisely apprising the adversary as to the amount, nature and basis of the claim, we have developed a tradition of doing what is strangely called "stating facts sufficient to constitute a cause of action," and the first rule of all is that the pleader must not "state evidence," must not "aver conclusions," but must build a "projectile-proof" edifice of words which will stand the test of "demurrer" and "motion" based on all

sorts of grounds and controlled by prodigious quantities of precedents, all of which give to the document qualities of circumlocution, indirection, technicality and the like, which continue to curse and plague the whole course of the case. I do not think it can be said that our present system of pleading commonly serves any end of justice; it is not a method of narrowing issues, eliciting truth, defining rights, or securing direct approach to the matters really in controversy. Anyone with a contrary impression would lose it soon, if he had often to listen to the efforts of counsel to cross-examine plaintiff or defendant as to the contents of pleadings verified by the party under interrogation.

The second problem comes as to *jurisdiction* and choice of the *court* in which action is to be started. Here again the business man confronts another maze, with the peril of defeat as the penalty for wrong inference from the mass of code provisions and judicial decisions. Instead of one court, we have many; instead of equivalent powers and jurisdictions in each of the courts even within the financial limits of its jurisdiction, we have in many instances an unfathomable hodge-podge, one aspect of which I have already elaborated upon in connection with my own court. Could a nation ever fight and win a war with a military organization limited and hampered as is judicial organization? Could a business establishment ever suceed?

The next anachronism is disclosed in the matter of *service* of the summons and complaint. The methods of "legal service" are so indirect, clumsy and out-of-date as to make a down-town business man laugh in the face of a judicial officer who has to work with such antiquated tools. It is as though men were compelled by law to ride in oxcarts and light their homes with tallow dips. The code provisions as to service of papers ignore everything that has happened in the world since the post office became a governmental institution. The registered mail, the telegraph and the telephone are modern devices which the law is unique and solitary in failing to recognize as means whereby one person may bring about the presence of another at a desired place at an indicated time.

THE HANDLING OF INTERLOCUTORY APPLICATIONS

From the time the case is at issue it runs a course which mock all the rules and expedients of directness and efficiency in handling

affairs which have been developed by modern business experience. Everything is done at arm's length; *interlocutory applications* of a purely administrative character, designed to narrow the issues, bring out the facts on undisputed issues, and prepare the controversy for trial under circumstances somewhat approximating adjudication on the actual merits, are treated as a part of a game of wits, are subjected to the authority of long-time precedents, instead of being judged on the merits of the situation disclosed in the particular case. Probably as many different judges express casual opinions regarding aspects of the case as there are applications made; the judge who has determined any of these preliminary things is rarely the judge who finally tries the case. The granting or withholding of these interlocutory expedients, such as discovery of books and papers, examination before trial, bills of particulars, amplification or clarification of the complaint, or the like, is permitted in this country to be the subject of appeals, and Appellate Courts undertake to redetermine each such matter as of first impression under the great mass of previous decisions, instead of looking upon it as a matter on which the judge at special term was warranted in using a reasonable discretion as to the method to be followed to prepare the case for a prompt, expeditious trial on the merits of its actual issues. The result of this casual attention on the part of many judges, in the trial court and on appeal, is long delay and a very unsatisfactory and fragmentary determination of phases of it by judicial officers who have casually dealt with the interlocutory applications.

A TRIAL BUILT FOR APPEAL AND RE-TRIAL RATHER THAN DETERMINATION

The *trial itself* lumbers on in practically the same fashion as was the vogue fifty or a hundred years ago. Methods and procedure throughout the business, political and industrial world have changed radically; the court lumbers on in practically the same old way, and committees on law reform rarely essay the task of giving sanction to more direct, exact and business-like expedients. The stenographer is about the only device at all modern which the court room trial has utilized to any degree, and even the stenographer is in nowise used to promote exactness of determination by court and jury upon the particular trial; the stenographer's services are to prepare the way for an appeal, and perhaps to guard the better

against changes of testimony on a second trial. The stenographer rarely does anything to aid the jury or the presiding judge to deal in exact and business-like fashion with the case on the first trial; no business office would think of utilizing the stenographer so little and so indirectly in connection with the performance of the task at hand. As in many other respects, the mechanics of the court room trial point to and prepare the way for an appeal, rather than promote an initial determination which would obviate appeal. I sometimes wonder if the time will not come when the stenographer's minutes or some improved "dictaphone" record of the testimony will be available for the aid of the jury.

I think I have sufficiently indicated a few of the aspects of legal procedure which give an impression of indirectness, inexactness and unsuitableness for the accomplishment of the object supposed to be in mind. There are many phases which I have not touched upon in this connection—for example, the modes of bringing witnesses to court, the anomalies in the law of evidence, the whole structure and theory of appellate review, the procedure after a higher court reaches the conclusion that error was committed on the trial below; but it seems preferable to devote the remaining paragraphs of this article to the constructive and affirmative side, the things which are worth thinking over as possible betterments in the practical workings of the legal mechanism. It should be kept in mind that, of course, any particular system or routine of legal procedure or juridical organization does not exist for its own sake and is not an end or objective in itself. The impartial, impersonal, expert arbitrament of private controversies under rules of law which nullify individual caprice and take no account of political influence, social position, or financial accumulations, is one of the great purposes for which Anglo-Saxon governments exist; but the mechanism, the procedure, are only means to an end, and should be scrutinized and dealt with as such.

THE REAL RIGHTS OF LITIGANTS AND THE PUBLIC

In the second place, it is often necessary to bring back to mind a realization that a law-suit is not a game of wits between opposing counsel; that no litigant has any right, vested or otherwise, in a mode of procedure which gives him a "sporting chance" to win on anything except disclosure and establishment of the actual

merits of his case; that he has no right at all to delay; and that the community itself has great reasons for interest in the maintenance of a system of administering justice under which a determination on the merits will be speedily, economically, efficiently reached, and under which no member of the community need feel that he has won or lost under "rules" and concepts which the community as a whole has with propriety long ago discarded. One of the great obstacles to reform in legal procedure has been the conscious or unconscious feeling of many lawyers that they have been schooled and trained to play a game, and their instinctive aversion to change in the rules, especially such a change as would mean that a prospective litigant with "no case at all" would soon find himself without need for the services of a lawyer. Many lawyers, and some litigants, feel that they have a right to have perpetuated a judicial mechanism under which a litigant with an astute lawyer can have "a run for his money" and possibly win a verdict, even though on the actual facts and established rules of law, he should have had judgment taken against him on the day after his adversary interposed his pleading. Three-fourths of the difficulty would be on the way to solution, if we could get out of the minds of lawyers and laymen the notion that the law is a game whose motto is "win if you can," rather than a branch and phase of government charged with a very important responsibility for reaching exactly and acceptably a result which is the very basis of free institutions. The lawyer schooled in a notion that his client should have a "right" to "a chance to win" where the law and the facts disclose no such possible right, is the worst foe of procedural reform through outside action and the most stubborn opponent of the efforts of judges to deal more directly with the situation themselves. In so far as we come to have lawyers with a more sincere and serious concept of what they are supposed to be doing and why there are lawyers at all, the mechanics of jurisprudence will be a less difficult problem, and changes in rules will be less essential, although still important.

"SPECIALIZED JUDGES" VS. "SPECIALIZED COURTS"

But to indicate briefly some of these queries as to possible change for the better. In the first place, instead of perpetuating all these troublesome questions about *jurisdiction*, whether the right action has been brought in the right court, and the like, would it not

be better to adopt, as a working principle and an ideal to be approximated in judicial organization, the concept of a single great court for the trial and determination of all cases and controversies, irrespective of their nature, the amount involved, or the basis of the relief asked? At the present time we have specialized courts—civil, criminal, surrogates', county, municipal, city, supreme and the like; we have all sorts of anomalies of jurisdiction for each court, as we have seen, and arbitrary lines of demarcation between them; if a suit is started in the wrong court, the plaintiff has all his trouble for nothing and has to start all over again. Instead of having specialized courts, would it not be better to have specialized judges, a court with complete jurisdiction of every phase of a controversy and power to do therein everything which a court can do in arbitrament and enforcement, and then the judges thereof assigned to various branches or parts, to deal there in specialized fashion with those types of litigation which they have shown themselves most competent to handle?

ORGANIZATION AND UTILIZATION OF ADMINISTRATIVE STAFF

In the second place, does it not seem fair and business-like that a court should be given *adequate administrative organization* and *adequate administrative control* over its own clerical subordinates? Courts are commonly thought of as made up of judges, a clerk or so, an officer, a stenographer, and perhaps an interpreter of foreign languages. In fact the administrative staff of a metropolitan court is a great unwieldy mass of unorganized employes, often chosen or promoted for reasons largely political, subject to no direct authority or responsible control, and utilized to a very small percentage of their potential usefulness in the administration of justice. A judicial officer on the civil side is practically marooned, so far as administrative aid in the ascertainment and disclosure of the facts pertinent to pending controversies, and yet what is the situation so far as the employes of the courts are concerned? On the civil side of the Supreme Court in the First Judicial District of New York state, comprising the counties of Manhattan and the Bronx, $660,000 a year is paid to judges, $774,000 to clerks, and $660,000 to attendants. In view of the fact that the judges receive $17,500 a year in salary, the significance of these figures is startling. Taking into account the civil, criminal and appellate branches of the Supreme Court in the same area, 22 per cent of the total salary list is for the judges;

two million dollars a year are paid to the clerical force and attendants alone. The business and administrative side, as well as the performance by the judges of their judicial function, needs greatly to be organized and modernized.

WHY IGNORE MODERN BUSINESS METHODS

Again, is not there need for a great modernization and adaptation of present-day business devices in *bringing men to court as litigants, witnesses,* and in other capacities? Is there any reason, under modern conditions, why registered mail could not be made as acceptable a method of service of a summons and complaint as so-called "personal service?" Is there any reason why most petty cases could not be as well started by mail notification from the clerk's offices? Is there any reason why the old-time system of subpoenaeing all witnesses for ten o'clock in the morning of court day after court day, by personal service of a subpoena, should be adhered to at all hazards, in disregard of modern expedients such as the telephone and telegraph which might make it possible for witnesses to remain in their offices until more nearly the time when their presence will be actually needed? Perhaps the most serious and the least excusable of all the waste of valuable time inflicted by our present legal system is the wanton waste of the time of helpless and unoffending witnesses, left altogether at the mercy of the indifference of counsel and the lumberings of a system of notification which dates back to the day when the farmer drove to the court house at the county-seat in the morning after he had finished his milking and attendance at court took on some of the aspects of a gala occasion.

Still again, ought not our judicial system for the handling of causes to be so adjusted that each case would receive, from start to finish, the *continuous attention of one trained judicial mind,* familiar with all its incidents and development, rather than the casual animadversion of many judges dealing with it in offhand and fragmentary fashion? I am impressed that one of two things ought to be done; I am not sure as yet which is preferable. The first is that all stages of the case, up to the time of actual trial, should be under the supervision and authority of a single judicial officer, to whom all interlocutory applications should be addressed, and who would really see to it that the case was in such shape as to get a fair determination of the disputed questions of law and fact on their merits. There-

after the case would come before another judicial officer for actual trial.

ONE JUDGE ON ALL PHASES OF EACH CASE

The alternative method would be to have the same judge also try the case who had handled its preliminary phases. The present system puts the trial judge in poor position to be a factor for the working out of justice in the particular case, for it has usually been mussed and muddled, long before it came before him, by an indefinite number of judges, and he knows and can learn, in the brief time available before he has had to rule on the decisive issues, little as to the history and previous course of the litigation. In the place of our present system of handling "pleadings" and the various interlocutory applications, it seems to me that something more like the following plan would be more likely to work out acceptable and substantial justice according to the actual merits, and would greatly reduce the number of cases ever actually tried at all.

When an action is started, it should be assigned at once to *a single judge or commissioner*, to have oversight over everything taking place in the action, at least up to the time of trial. The "pleadings" or notification with which the proceeding is started need be only a brief, concise apprisal of the defendant as to the nature and amount of the claim; further details could well be left to be developed, upon the application of the defendant, under the supervision of the judge or commissioner in charge of the preliminary phases of the suit. The sole object of this judicial officer should be to get the matter in the best possible shape for the trial and disposition of the case on the merits of the actual testimony upon the issues of law or fact which give rise to, and constitute the real "nub" of, the controversy between the parties; and in doing this and seeking this result he should act in direct, open-minded fashion, according to the needs of the particular case, should act in a manner which would commonly be regarded as in part administrative rather than solely formal and judicial, should be left unhampered by multitudes of judicial decisions upon procedural matters, and should be subject to appellate review only for arbitrary action and manifest departure from the fundamental purpose which I have indicated. Most of the interlocutory matters now regarded as "special term" functions would best be taken out of the atmosphere of judicial determination and review altogether, and the judicial officer left free to confer directly with the

attorneys and their clients, consult the details and developments of the particular case, and direct therein the doings of whatever may seem best to promote the fundamental purpose of all action in advance of and preparation for trial. For example, he should seek to shape the pleadings so as to narrow and define the issues, and disclose the actual issues; he should grant, supervise, conduct examinations before trial, discovery of books, accounts, papers and the like, in the interests of justice and the full ascertainment of the facts. Most of the facts in relation to the subject-matter of an action are not in dispute; the ends of justice would be almost always served if these were required to be agreed upon, reduced to written stipulations and thus embodied in such form that the trial court and jury would have before it the undisputed facts in such definiteness and accuracy of form as to afford a good starting-point for the consideration of the questions of fact which are disputed. For example, in the case of an action against a street railway company for a crossing accident, the physical facts as to the surroundings at the intersection, the vehicles which figured in the accident, and the like, ought to be made the subject-matter of well-formulated statements and suitable photographs, as better basis for the guidance of the jury when it takes up the questions really disputed.

QUESTIONS WHICH SHOULD NOT BE IN ISSUE AT ALL.

There are many matters now left within the category of disputed questions as to which the judge or commissioner ought to prepare the way to place at the disposal of the eventual trial court the results of better administrative handling of the case, with the objective of fairly ascertaining and fully disclosing the true facts ever in mind. For example, thousands of cases tried in the courts of this city each year turn upon the question of the conformance of goods delivered to sample furnished or to trade description quoted. These questions are of necessity dealt with, at present, in a court room trial, in the most crude, offhand, inaccurate manner; there is a wide and inexcusable margin of error; time and again the efforts of adroit, unscrupulous counsel and glib, lying witnesses completely fool the jury on such issues. Under a proper system such questions, or cases turning on such questions alone, would hardly ever reach a jury at all. They are questions, in the first instance not for a jury or court at all, but for a bureau of standards, trained in analysis,

familiar with trade formulas, expert in trade standards. To such a body the judge or commissioner should have power to refer a case involving questions such as I have indicated, and its expert, impartial, disinterested report upon the facts, for example, as to the ingredients of the sample furnished and of the goods delivered, should be thus made available to the trial court, if the case ever came to the point of trial. In point of fact no large proportion of commercial controversies would ever survive such a scrutiny as I have indicated in the foregoing paragraphs; the system would sound the death-knell of "strike" and "hold-up" litigation. Any system which lessens the chance of unmerited victory and decreases the possible effectiveness of the efforts of counsel to lead the trial away from the actual facts, the real merits, will greatly decrease the volume of baseless litigation. Any system likewise which leads to generous mutual disclosure, in advance, of the documentary and other evidence, and the legal and other contentions, on which the opposing claims are mutually based, will have the greatest possible effect in bringing about settlement, through compromise, concession or otherwise. As the litigants and their counsel find the controversy reduced to its lowest terms, they will find surprisingly little left to litigate about, aside from questions of law, which they will find the right sort of counsel can determine for them just about as well, and much less expensively, out of court as upon a court room trial.

There are many phases of betterments which might prove of aid to the administering of justice, each of which would be suitable subject-matter for a whole article by itself, and therefore can only be indicated within the permissible limits of this article. For example, upon the whole matter of so-called "expert" testimony, a better administrative organization of our judicial mechanism, based upon the fundamental principle which runs through the present discussion, would enable the trial court and jury to have the aid of really expert information, the advice and counsel of disinterested, qualified, well-informed specialists, whose trained observation and impartial opinions would be of real help to the jury, and would put to rout the scandalous brigade of hirelings who so often masquerade as "experts" in aid of whichever side unconscionably brings them into court. Radical change in the whole basis of "expert" testimony is one of the most important of the potential betterments in

procedure which would make for accuracy and acceptability of the results reached through the administration of justice under law.

THE WORKABLE IDEAL OF OUR JUDICIAL SYSTEM

The enforced limits of space and time forbid a similar discussion of the mechanics of court room trial and the mechanics of appellate review, although the queries already advanced have, of course, a vital bearing upon the entire subsequent history of a suit thus started. The workable ideal of our judicial system ought, in my judgment, to be as to every civil action:

> One prompt, fair, impartial trial on the merits, with full disclosure of the actual facts, and then, if either party feels aggrieved, one appeal, to a court vested with plenary power to correct, and not merely detect, error and conform the result reached below to the requirements of the correct legal rule as maturely conceived by the appellate tribunal.

Where there has been trial by jury below, and the error below has been plainly one of law, with the disputed questions of fact separably determined, the appellate court may well, in pursuance of this basic objective, be vested with broad power to award final judgment according to the facts as found and the law as conceived by the appellate court. Where the defect disclosed on appeal is one of formal or record proof, involving no question of weighing the credibility of witnesses, the appellate court may well be vested with power to permit the remedying of the defect without reversal of the whole judgment. Where error has occurred only as to one phase of the issues of fact in the case, the appellate court may well be vested with broad power, in its discretion, to remand the case for re-hearing in the Trial Court upon such phase of the issues and not upon the whole case. For example, if the question of *liability* has been determined in a negligence suit, but error has taken place on the rule of damages, need the whole cause be invariably re-litigated, or may not a re-finding on the question of damages alone be directed? Of course, on many of these things, we are still a long way in this country from the practicable ideal above quoted, but the time may not be far distant when the young men who are now coming to the bar will find themselves confronted with the task of working out the details of fulfilling an emphatic public demand in these respects.

Let no one think that this article has been inspired by any lack of appreciation of the work of our courts and the importance of the

proper discharge of the judicial function in a democracy. There is in my judgment no task more fundamental, no phase of public service or professional activity to which a young man may more satisfactorily devote his energy, vision and enthusiasm. The law I conceive to be a great, vital, *living* concept of human relationship, based on standards of fairness, reason, practicability, and effectiveness, such as have entitled it to be called "crystallized common sense," and withal fair and logical in its workings and applications. The mystification of legal procedure robs the law of its basic "common sense," and its anomalies rob it of fair, even, logical application. The task which I have outlined is therefore essential to the very life of the law. We make a mistake, however, when we conceive the administration of justice under law to be a task entrusted to courts alone. Many vital aspects of legal administration are now entrusted to regulative commissions and quasi-judicial tribunals which have been given more adequate, suitable organization because emancipated from what has thus far been our tradition as to tribunals called courts. Every young man at the bar, whether or not in a judicial office, and whether or not identified with any of those newer instrumentalities of juridical administration which link up so intimately to the whole topic of betterment in our courts, will find ample opportunity for full use of his talents and constructive abilities in the days and years that are ahead. This article is prolix and fragmentary, but if it and its companions in this volume can have any part in persuading men of the profession resolutely to "keep their eyes on the ball" and measure up to the major task which the public will shortly impose in earnest upon the bar and the courts, they will no doubt have fulfilled their purpose.